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BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.

Joint Application of DELTA AIR LINES, INC. SWISSAIR, SWISS AIR TRANSPORT COMPANY, LTD. SABENA S.A., SABENA BELGIAN WORLD AIRLINES, and AUSTRIAN AIRLINES, ÖSTERREICHISCHE LUFTVERKEHRS AG for Approval of and Antitrust Immunity for Alliance Agreements Pursuant to 49 U.S.C. §§ 41308 and 41309	) Docket OST-95-618 - 41

RESPONSE OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION TO ORDER TO SHOW CAUSE

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BEFORE THE
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Joint Application of DELTA AIR LINES, INC. SWISSAIR, SWISS AIR TRANSPORT COMPANY, LTD. SABENA S.A., SABENA BELGIAN WORLD AIRLINES, and AUSTRIAN AIRLINES, ÖSTERREICHISCHE LUFTVERKEHRS AG for Approval of and Antitrust Immunity for Alliance Agreements Pursuant to 49 U.S.C. §§ 41308 and 41309	)	Docket OST-95-618

RESPONSE OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION TO ORDER TO SHOW CAUSE

The International Air Transport Association ("IATA") submits this response to the Department's May 20, 1996 Order to Show Cause in this docket.[1/] As in Docket OST-96-1116, the Department is proposing a strict limitation on further participation in IATA tariff coordination by Delta and its allied carriers as the price for antitrust immunity.[2/] IATA opposes

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1/ Order 96-5-26.

2/ Id. at 33:

> 3. We tentatively direct interested persons to show cause why we should not further condition our grant of approval and immunity to require Delta Air Lines, Inc., Swissair, Swiss Air Transport Company, Ltd., Sabena, S.A., Sabena Belgian World Airlines, and

(continued...)

the imposition of this condition which critically infringes on issues pending in Docket 46928 for the reasons previously set forth in its opening comments in this docket and in its May 16, 1996 response to the United/Lufthansa Show Cause Order[3/] which IATA hereby incorporates by reference and makes a part hereof.

In an Order issued concurrently with the instant Order to Show Cause, DOT has made final its approval of the United/Lufthansa Alliance Agreement, subject to a condition limiting the carriers participation in IATA tariff coordination which is identical in purpose and effect to that which it now would impose on Delta and its allied carriers."' Because the Department's United/Lufthansa Final Order presumably reflects the common rationale for imposing the IATA tariff coordination condition, IATA will respond to the points in that Order. In general, IATA believes that DOT's response to IATA in its

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[2/] (. ..continued)
Austrian Airlines, Österreichische Luftverkehrs, AG to withdraw from participation in any International Air Transport Association (IATA) tariff coordination activities that discuss any proposed through fares, rates or charges applicable between the United States and Switzerland, Belgium, or Austria, and/or between the United States and any other countries designating a carrier granted antitrust immunity, or renewal thereof, for participation in similar alliance activities with a U.S. carrier;

[3/] Order 96-5-12.

[4/] Order 96-5-27, at 17.

United/Lufthansa Final Order is superficial and likely to generate renewed international concerns of the type supporting Order 85-5-32 and already of record in Docket 46928.

IATA first focused on the due process need to accord meaningful notice and opportunity to be heard to all participants in Docket 46928 with interests affected by the proposed condition. IATA pointed out that the proposed IATA condition appeared out of the blue only two weeks ago in the United/Lufthansa Show Cause Order. No one had proposed such a condition in that proceeding (or in the instant proceeding). Certainly the Department itself had given no warning of such a condition, even though its procedures pose no barrier to giving a reasonable, fair warning to all interested persons either in this docket or Docket 46928. In short, the most fundamental of due process considerations -- fair notice -- was simply ignored.

Moreover, there was no practical opportunity for a response by all affected persons, most especially those governments and other entities that are participating in Docket 46928. The United/Lufthansa Show Cause Order was issued on May 9 and called for responses in six calendar days. The Department knows full well that six days is not adequate to permit the foreign air carrier and governmental parties in Docket 46928 to express their views on a condition which it quite clearly intended to apply not only to United/Lufthansa, retroactively to **Northwest/KLM** and prospectively to all future alliances, including the Delta

alliance. Thus, in the short period of less than two weeks, the Department proposed to make a final determination to remove from IATA passenger and cargo tariff coordination three major U.S. carriers and five major European carriers in five major country pairs and in all additional U.S. markets in which it approves alliances.

Order 96-5-27 claims that IATA was generally aware of DOT's intention to explore the relationship between alliances and tariff coordination last fall when the Delta application was filed.[5/] Inexplicably, it equates this general awareness with adequate and fair notice of its actual proposed condition with was not announced until two weeks ago. Whatever may have been in the Department's mind last fall clearly evolved in the intervening months from vague rumination into a specific and unforeseeable proposal. Yet, at no time during this evolutionary period did the Department give IATA or any of the other parties to Docket 46928 any inkling of its actual plans for limiting allied carrier participation in tariff coordination. By the time it did so, there was no meaningful opportunity for the participants in Docket 46928 to take any steps to protect their interests.

It is noteworthy that the Department does not deny that it made no attempt to inform IATA or any of the other private or public parties in Docket 46928, including many foreign

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[5/] Order 96-5-27, at 10.

governments who have submitted comments, of its specific proposals for conditioning alliance carrier participation in IATA tariff coordination, including limitation of participation in markets in which they do not even offer services. Had the Department given the participants in Docket 46928 a fair and reasonable opportunity to respond -- rather than six calendar days -- the record before it on the subject of conditioning IATA tariff coordination would be quite different.

The Department observes that "[a]part from IATA, no general or specific objections to our proposed condition have been filed in this Docket."[6/] In the circumstances, that is hardly surprising. Indeed, it is to be expected when fair notice and adequate opportunity to respond have been denied.

IATA next argued that the tariff coordination condition is inconsistent with the findings in both the United/Lufthansa and the instant proceeding. Again, the Department responded with a cascade of words, but no explanation of substance. Having determined that the U.S.-Europe and other markets analyzed are highly competitive and that the Northwest/KLM alliance has yielded all expected economic efficiencies; having otherwise described a marketplace environment that is effectively competitive notwithstanding IATA tariff coordination; and having determined that the proposed alliances will only enhance competition -- the Department has provided no basis for limiting

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[6/] Id.

participation in tariff coordination by alliance partners or for taking any risk of disrupting the interline system which provides alliances with significant competition.

DOT then alludes vaguely to "potential anticompetitive effects" of the "immunity provided for the alliances internal integration."[7/] What exactly are the "potential anticompetitive effects of the immunity provided for the alliances internal integration" to be remedied by the IATA tariff coordination condition? These "potential anticompetitive effects" are never articulated in the United/Lufthansa Final Order or in either of the alliance Show Cause Orders. In any event, whatever these "potential anticompetitive effects" may be, it is equally unclear how they relate to IATA tariff coordination, or why limiting the alliance carriers continued participation in that coordination would offset such "effects." This is particularly the case, given DOT's observations about the highly competitive environment which co-exists with tariff coordination.

In short, there is a inconsistency between DOT's findings about the competitive environment, including the success of the Northwest/KLM alliance, and its decision to impose the condition on IATA tariff coordination which is unresolved in DOT's

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[7/] Id. DOT also points to findings on tariff coordination that it made well over a decade ago in Order 85-5-32, but these are specifically under review in Docket 46928 where they should be evaluated.

United/Lufthansa Final Order, and nothing in the instant Show Cause Order further illuminates this subject.

IATA also continues to believe that the scope of the proposed condition is without record support, particularly inasmuch as it would require alliance carriers to refrain from tariff coordination in markets that the alliance does not serve. While the Department engages in opaque discussion of problems "pressed" upon it by a potential grant of "dual immunity," that concept simply highlights the fact that the alliance partners already are permitted to coordinate tariffs in the IATA framework.[8/] Why a confirmation of that immunity in the alliance framework should require a restriction of the prior grant remains unexplained.

The alliance agreements are portrayed as de facto mergers and DOT has applied merger principles to analyze them competitively. Immunity is premised on the need to permit the alliance form to be treated on the same basis as an actual merger. During the 1980's, when U.S. carriers grew exponentially under a liberal DOT merger policy, DOT did not single them out and restrict their continued ability to participate in IATA tariff coordination. Similarly, as airlines have grown internally to achieve the size and scale sought by the allied

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[8/] Id.

carriers, it has never been suggested that size, itself, should preclude participation in IATA tariff coordination.[9/]

IATA also questioned the Department's summary dismissal of concerns expressed in Docket 46928 by smaller carriers around the world and by many governments on the continued need for tariff coordination to assure the ability of such carriers to compete on an interline basis with larger carriers or alliances possessing stronger and more extensive route systems. IATA noted that DOT had given only perfunctory consideration to this issue in its United/Lufthansa Show Cause Order -- i.e., observing that technical aspects of interlining are adjusted outside tariff coordination.

DOT's response in the United/Lufthansa Final Order was to argue that IATA had the burden of coming forward with evidence that tariff coordination facilitated interlining. IATA has met that burden in Docket 46928, which is replete with such evidence, including lengthy pleadings on this subject submitted by IATA and the U.S. Department of Justice and submissions by dozens of foreign governments and air carriers. IATA's point throughout these alliance proceedings has been that DOT is ignoring the record in Docket 46928 and the interests of the participants

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9/ Thus, the immunity sought and received by the allied carriers in order for them to operate as larger entities has no relevance to IATA tariff coordination. If there are questions to be addressed about the size of airlines and continued participation in IATA tariff coordination, those issues should properly be addressed in Docket 46928.

therein on such critical issues as the relationship between tariff coordination and interlining, particularly as it affects the airlines of smaller or newly-emerging countries.

IATA's final point also remains substantively unaddressed. IATA observed that foreign governments participating in Docket 46928 could not have understood that they would have to participate in the alliance dockets in order to have the same issues be considered by DOT as are pending in Docket 46928. In its United/Lufthansa response, DOT has merely reasserted that its adoption of the proposed condition restricting IATA tariff coordination "following notice and an opportunity for all interested parties to comment on the condition" did not constitute an improper circumvention of the proceedings in Docket 46928.[10/]

However, the Department also makes reference to "related questions of comity and reciprocity affecting the relevant markets" as a basis for imposition of the conditions that are "particular to and necessary for the resolution of the applications before us, and not suitable for resolution in Docket 46928."[11/] Nowhere in the record is there any explication of such "related questions of comity and reciprocity," nor is there any discussion of the consideration of the interests of all the governments expressed in Docket 46928.

[10/] Id.

[11/] Id.

WHEREFORE, for the foregoing reasons, IATA objects to condition 3 in the instant Show Cause Order and respectfully requests that all issues involving continued participation in IATA tariff coordination be properly considered in Docket 46928.

Respectfully submitted,

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May 28, 1996

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response of the International Air Transport Association has been served by facsimile upon Washington, D.C. counsel for the air carriers and the Department of Justice listed below and by first class mail, postage-prepaid, upon the remaining persons listed below, this 28th day of May 1996.

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